No. 20495

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FARMER BROS. CO.,

Appellant,

vs.

HUDDLE ENTERPRISES, INC.,

Appellee.

Upon Appeal From No. 121,094-MC in the United States District Court, Southern District of California, Central Division.

APPELLANT'S REPLY BRIEF.

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I.

Refocusing the Record.

Appellee's Brief raises no question or point of law not heretofore discussed in Appellant's Opening Brief. Appellee's Brief does, however, contain few references to the record before this Court, and myriad assertions of "fact" entirely unsupported by the record and entirely new to Appellant. Furthermore, we sincerely insist that the Appellee's failure to comply with Rule 18(3) of this Court is intentional, not the product of oversight.

Out of a desire not to prolong this reply unnecessarily, but in fear that many such statements made by Appellee be treated as factual, and supported somehow

in the Transcript of Record, we make the following observations about only the most gross assertions.

1. Appellee states, in effect, that the moneys advanced by certain creditors to secure confirmation of the Amended Plan of Arrangement discharged certain tax claims against Appellee which were a personal liability of its board of directors upon which Appellant had a representative; that consequently Appellant received a benefit from the advancement of such funds and confirmation of the Amended Plan contrary to its assertion that, as a secured creditor, it received no gain or advantage whatsoever therefrom. Thus, at pp. 9-10 of Appellee's Brief:

> "A question as to the liability of the directors of debtor on some of the government's tax claims was ever present."

And at page 10:

> "By use of the funds advanced to pay all tax claims, there was no longer a question remaining as to the liability of a director of the debtor corporation to pay such claims."

And at page 21:

> "Furthermore, it would no longer be possible for the taxing agencies to lay claim against Farmer Bros. Co. or its representative on the Board of Directors of debtor, for failure to pay certain taxes which had been collected by debtor in a trust capacity, such as withholding taxes."

Finally, at page 30:

> "There was also a consideration running to Appellant by the payment of tax claims, which if not paid by the debtor, would have been a liability of Appellant's representative upon the board of directors of debtor, such as withholding taxes which accumulated during the operation by debtor."

Appellee does not support these contentions by any reference to the record and, indeed, it could not. There was, and is, no evidence upon which they could be based.

2. Appellant has contended that the Amended Plan of Arrangement was in default at the time it petitioned the lower court for permission to foreclose, in that the installment payments of interest on the secured liens of junior lienholders had not been made as expressly provided by Paragraph XI, Article X of the Amended Plan. It then argued (App. Op. Br. pp. 19-21), that Finding of Fact No. XIII [Tr. Rec. p. 67], to the effect that Appellant had been tendered such interest was erroneous as a matter of law.

To such contention Appellee responds, (Appellee's Br. p. 24):

> "Appellant says it has received no interest. We do not believe Appellant will dispute the fact that debtor tendered it a cashier's check for the interest due on the date of the hearing herein, and that it is still holding this check uncashed. The record shows that the tender was made."

Of course Appellant disputes this so-called fact. Again, there is no reference to the record which would even remotely support such an assertion.

II.

Refocusing the Argument.

Lastly, Appellant has contended that in the absence of its consent, the rights of a secured creditor cannot be affected or arranged in a Chapter XI proceeding (App. Op. Br. pp. 8 *et seq.*) and that the doctrine of estoppel should not be availed of as an instrument to reach beyond the prescribed limits of the Bankruptcy Act (App. Op. Br. pp. 21 *et seq.*).

Warping those contentions, Appellee asserts, under the heading "Law Of The Case" (Appellee's Br. p. 7):

> "We have no serious dispute with the contention of Farmer Bros. Co. that in the absence of the consent of a secured creditor or secured creditors, *or of acts and conduct amounting to estoppel,* the secured claim of such creditor or creditors is not affected by a Plan of Arrangement." (Italics added).

No case holds by dictum or otherwise that the "voluntary agreement" referred to in *Collier on Bankruptcy,* 14th Ed., Vol. 9, page 187 (See App. Op. Br. p. 11) may be supplied by an estoppel. To so hold now would seriously cloud the rights, status and title of every secured creditor touched by a Chapter XI proceeding.

III.

Conclusion.

We stated before that the Amended Plan of Arrangement did not prohibit foreclosures but actually contemplated that eventuality (App. Op. Br. pp. 42-43). The Amended Plan provided, in pertinent part, at Art. XIX, Paragraph XIII [Tr. Rec. p. 14]:

> "That it is necessary for a speedy and proper administration of debtor's affairs and the equitable payment of creditors that all creditors and all parties be enjoined and restrained from commencing or prosecuting any suit or foreclosure proceeding in any manner *other than before the above entitled Court* . . ." (Emphasis added).

We further indicated that the motivating cause of Appellant's application for permission to foreclose was the breach of the provision in the Amended Plan providing for monthly payments of interest on the debts

secured by junior liens. To this, Appellee responds at pages 22-23 of its Brief:

> "Also, the fact that the plan relates that certain funds would be earmarked for the payment of interest on junior liens, was not made for the purpose of trying to bind any secured creditor who refused to go along with the contemplated plan, but rather to inform unsecured creditors what certain funds of debtor would be used for."

The Amended Plan of Arrangement, and the Order Confirming And Approving Plan of Arrangement As Amended, will speak for themselves. It is patently preposterous to assume that Appellant, or any other junior lienholder for that matter, intended to cast its fate to the general, unsecured creditors for an indefinite period of years when the provisions of Chapter XI of the Bankruptcy Act neither contemplate nor require that it do so. It is ridiculous to assume that the monthly payments to the junior, secured creditors was not held out as an inducement to inaction.

If there has been any deceptive conduct, or representation, or breach of duty; if there has been any failure to do what was to be done, it lay with the Appellee, to either obey the mandate of the Amended Plan and the Order Confirming the same or candidly advise the secured creditors that it could not, or would not, and get on about the business of an ordinary bankruptcy. That was never done.

Respectfully submitted,

Walker, Wright, Tyler &
Ward,
By Edward M. Lynch, and
Brownell Merrell, Jr.,
Attorneys for Appellant.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Edward M. Lynch